Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-463

DOMINICK DIGIRLOMO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

- (1) The Decision Below Conflicts With the Decision of the Court of Appeals for the Second Circuit As to the Proper Interpretation of 28 U.S.C. §515(a) 7
- (2) The Decision Below Raises a Significant and Recurring Problem in the Administration of Criminal Prosecutions 8
- (3) The Decision Below Raises Significant Questions Concerning the Traditional Primary Role of the United States Attorney 9
- (4) The Decision Below Is Contrary to the Clear Language of the Statute and Its Legislative History 10
- (5) The Decision Below Raises Significant Issues Concerning the Proper Interpretatian and Application of 28 U.S.C. §510 11

Conclusion 13

Appendix A—Opinion, U. S. Court of Appeals for the Eighth Circuit 17

Appendix B—Memorandum and Order, Stipulation, and Amended Order, U. S. District Court 20

Appendix C—U. S. v. Wrigley 48

Appendix D—U. S. v. Agrusa 63

Citations

CASES

In re Grand Jury Subpoena of Alphonse Persico, No. 75-2030 (C.A. 2, June 19, 1975) 7, 12

United States v. *Agrusa*, No. 74 CR 269-W-1 (W.D. Mo., Feb. 5, 1975) 8

United States v. *Agrusa*, No. 75-1196 (C.A. 8, July 18, 1975) 12

United States v. *Crispino*, No. 74 CR 932 (HFW) (S.D. N.Y., Feb. 13, 1975) 8

United States v. *Dulski*, No. 74-CR-100 (E.D. Wisc., May 23, 1975) 8, 9

United States v. *Morse*, 292 Fed. 273 (S.D. N.Y., 1922) 10

United States v. *Giordano*, 417 U.S. 563 (1974) 11, 12, 13

United States v. *Rosenthal*, 121 Fed. 386 (S.D. N.Y., 1903) 9

United States v. *Wrigley*, No. 74 CR 448-W-1 (W.D. Mo., Mar. 11, 1975) 8

United States v. *Wrigley*, No. 75-1235 (C.A. 8, July 18, 1975) 7

STATUTES

1 Stat. 92 9

1 Stat. 93 9

18 U.S.C. §6001 5

28 U.S.C. §510 .... 3, 11, 12, 13

28 U.S.C. §515(a) 2, 3, 7, 8, 9, 10, 11, 12, 13

28 U.S.C. §547 9

28 U.S.C. §1254(1) 2

28 U.S.C. §1826 5

FEDERAL REGULATIONS

28 C.F.R. §0.55 12

28 C.F.R. §0.60 12

28 C.F.R. §0.133 12

CONGRESSIONAL REPORTS

Rep. No. 23, 81st Congress, 1st Sess. (1949) 12

Rep. No. 2901, 59th Congress, 1st Sess. (1906) 11

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. ____________

DOMINICK DiGIRLOMO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Dominick DiGirlomo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 18, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 15-19) is not yet officially reported. The opinion of the district court (App. B, infra, pp. 20-47) is not yet officially reported.

JURISDICTION

The judgment of the district court was entered March 26, 1975, and amended April 1, 1975 (App. B, infra, pp. 20-46, 47). Notice of appeal was filed April 18, 1975. The case was submitted to the court of appeals on May 16, 1975. The judgment of the court of appeals was entered on July 18, 1975. A timely petition for rehearing *en banc* was denied August 12, 1975, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the Attorney General of the United States, pursuant to 28 U.S.C. §515(a), may direct attorneys of the Department of Justice to conduct civil and criminal litigation, including grand jury proceedings, on behalf of the United States without limitation as to case or district, wholly apart from the supervision of the United States Attorneys for the various districts and without an appointment by the President of the United States and approval by the Congress of the United States.

Whether the Attorney General's authority under 28 U.S.C. §515(a) is delegable pursuant to 28 U.S.C. §510.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28

§510. Delegation of Authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

§515. Authority for legal proceedings; commission, oath, and salary for special attorneys

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

STATEMENT OF THE CASE

Petitioner DiGirlomo was subpoenaed to appear before the United States District Court for the Western District of Missouri for the purpose of testifying before a grand jury. That subpoena was caused to be issued by William Zleit, an attorney employed by the Department of Justice and assigned to the Kansas City field office of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice (hereinafter sometimes referred to as the "strike force"). Zleit purported to act on behalf of the United States pursuant to the following letter of appointment:

> "Mr. William E. Zleit
> Criminal Division
> Department of Justice
> Washington, D.C.
>
> Dear Mr. Zleit:
>
> The Department is informed that there have occurred and are occurring in the Western District of Missouri and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.
>
> As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection, you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

> Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.
>
> You are to serve without compensation other than the compensation you are now receiving under existing appointment.
>
> Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.
>
> Sincerely,
>
> /s/ Henry E. Petersen
> Henry E. Petersen
> Assistant Attorney General"

Zleit and three other attorneys (Cornwell, Adams and Tetrick) also assigned to that strike force field office and acting pursuant to letters substantially identical to the Zleit letter, supra, were present before the grand jury and conducted those proceedings at times when appellant was called upon to testify. DiGirlomo declined to testify. He was granted immunity pursuant to Title 18 U.S.C. §6001 et seq., and directed to testify. DiGirlomo again declined to testify. The United States moved for an order of confinement pursuant to Title 28 U.S.C. §1826. DiGirlomo opposed the motion for confinement on the ground that Zleit and the other attorneys appearing in the grand jury proceeding purportedly on behalf of the United States were unauthorized persons before the grand jury, were not "attorneys for the government" within the meaning of Rule 6 of the Federal Rules of Criminal Procedure and thus violated DiGirlomo's constitutional and statutory rights to give testimony in secret.

By stipulation, it appears that attorneys Zleit, Cornwell, Adams and Tetrick are not United States Attorneys or Assistant United States Attorneys, were not selected or interviewed by the present United States Attorney or his predecessor in office but were interviewed and hired by officials of the Department of Justice, in Washington, D.C. It was further stipulated that said attorneys were assigned to the Kansas City Field Office, an office physically separate from, and not included within the budget of, the office of the United States Attorney for the Western District of Missouri. It was further stipulated that the geographic scope and activities of the Kansas City Field Office of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice include districts other than the Western District of Missouri, specifically including, but not limited to, the District of Kansas, and that they rely on no grant of authority other than as may be contained in the above quoted letter. These attorneys, by admission, work under an attorney in charge of the field office and under the chief of the organized crime section of the Department of Justice, neither of whom are appointed by the President of the United States.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of the Court of Appeals for the Second Circuit As to the Proper Interpretation of 28 U.S.C. §515(a).

The Eighth Circuit's holding is in conflict with the decision of the Second Circuit in *In re Grand Jury Subpoena of Alphonse Persico*, No. 75-2030 (C.A. 2, June 19, 1975) on the important question whether 28 U.S.C. 515(a) empowers the Attorney General of the United States to appoint special attorneys to appear before grand juries and prosecute cases in the various districts of the United States without specification as to cases or defendants or districts.

In both the instant proceeding and in *Persico*, supra, the facts are substantially identical. In both cases, the Courts concluded that the attorneys had been appointed pursuant to 28 U.S.C. 515(a). In *Persico*, the Court concluded ". . . that an officer or other full time employee of the Department of Justice must be 'specifically directed' to conduct grand jury proceedings if he is not a United States Attorney or an Assistant United States Attorney." The Eighth Circuit in *United States* v. *Wrigley*, No. 75-1235 (C.A. 8, July 18, 1975) (App. C, infra, at page 48), which opinion was made the basis for decision in the instant case and which was handed down on the same date, concluded that "[t]he purported limitation [a specific direction] to the Attorney General's powers is not contained in the statute and is contrary to the thrust of the statutory scheme." At footnote 11 to its decision in *Wrigley*, the Court rejected

> ". . . the view of the Second Circuit that the power of the Attorney General to authorize special attorneys to appear before grand juries is limited to situations

> where there is a special reason to limit the role of the local district attorney and where that reason has been made explicit by the Attorney General."

This conflict justifies the grant of certiorari to review the judgment below.

2. The Decision Below Raises a Significant and Recurring Problem in the Administration of Criminal Prosecutions.

The question presented is of national significance. Strike forces have been established in seventeen cities throughout the United States. Challenges to attorneys functioning pursuant to letters substantially identical to the Zleit letter, to petitioner's knowledge, have been raised in the Southern District of New York, the Eastern District of New York, the Western District of Pennsylvania, the Eastern District of Wisconsin, the Northern District of Illinois, the Western District of Missouri, the District of Kansas, and the Northern District of California. The decisions in the district courts are conflicting in both principle and result,[1] and in two instances there are conflicts within the District—Southern District of New York and Western District of Missouri. Cases are presently pending before the courts of appeals for the Seventh and Ninth Circuits. The question presented is germane to every felony prosecution brought by strike force attorneys which in fiscal year 1972[2] numbered 121 defendants pursuant to indictments.

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[1] District Court decisions holding the letters invalid pursuant to 28 U.S.C. §515(a) are found in *United States* v. *Agrusa*, No. 74 CR 269-W-1 (W.D. Mo., Feb. 5, 1975); *United States* v. *Crispino*, No. 74 CR 932 (HFW) (S.D. N.Y., Feb. 13, 1975); *United States* v. *Wrigley*, No. 74 CR 448-W-1 (W.D. Mo., Mar. 11, 1975); *United States* v. *Dulski*, No. 74-CR-100 (E.D. Wisc., May 23, 1975).

[2] 1972 is the latest year for which petitioner has statistics but is under the impression that this figure increases each year.

The widespread effects of the use of strike force attorneys and the unsettling effect on the criminal process, including the integrity of grand jury proceedings, warrants the grant of certiorari.[3]

3. The Decision Below Raises Significant Questions Concerning the Traditional Primary Role of the United States Attorney.

The Eighth Circuit has decided an important question of federal law, which has not been, but should be, settled by this court. The question presented lies at the heart of our federal system of law enforcement. As stated in *United States* v. *Rosenthal*, 121 Fed. 386, 387 (S.D. N.Y., 1903), the question "is not narrowed to the mere appearance of an unauthorized person in the grand jury room for a limited participation in the proceedings, but is enlarged to a comprehensive transfer of authority from the local law officer of the community to the central law officers of the government, in whom such authority has never been reposed." See also *United States* v. *Dulski*, No. 74-CR-100 (E.D. Wisc., May 23, 1975) (slip opinion, page 5). The first Congress established the offices of attorney general and district attorneys, 1 Stat. 92 and 93. The district or United States attorneys since that time have been charged in the first instance "to prosecute for all offenses against the United States." 28 U.S.C. §547. United States Attorneys are appointed by the President, by and with the advice and consent of the Senate. The Eighth Circuit in this decision holds that special attorneys appointed, not by the President and without the advice and consent of the Senate, but pursuant to 515(a) are empowered as are

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[3] Both Law Week and Criminal Law Reporter have given substantial attention to the recent litigation concerning 28 U.S.C. §515(a). See for example, 17 CR L. 2310 (July 16, 1975).

United States attorneys and unlike United States attorneys are not restricted to a particular district.

This Court has not definitively considered the role of the United States attorney vis-a-vis the Attorney General since its decision in the *Confiscation Cases,* 74 U.S. 196 (1869). The use of strike force attorneys as an independent prosecutorial force represents an unprecedented departure from the traditional role of the United States Attorney and warrants the grant of certiorari.

4. The Decision Below Is Contrary to the Clear Language of the Statute and Its Legislative History.

The interpretation of 515(a) by the Eighth Circuit is contrary to the plain language of the statute and the expressed intent of the Congress. The Court concludes at page 11 of the slip opinion (App. A, page 17):

> Their letters of appointment stated that they were "specially authorized and directed * * * to conduct * * * any kind of legal proceedings * * * including grand jury proceedings * * * which United States Attorneys are authorized to conduct." Section 515(a) on its face does not require more.

The Court thus writes out of the language of 515(a) the phrase "when specifically directed by the Attorney General" a phrase the Second Circuit concludes to be the meat of 515(a). This construction by the Eighth Circuit is also contrary to the opinion of Augustus Hand, J., in *United States* v. *Morse,* 292 Fed. 273 (S.D. N.Y., 1922), a decision long considered to be the landmark in the interpretation of 515(a).

The legislative history is replete with evidence that the words "when specifically directed" are substantive.

Thus, the House Judiciary Committee Report No. 2901 to H. R. 17714 (28 U.S.C. §515(a)) stated to the House of Representatives the following:

> As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be and no matter how necessary it may be to the interests of the Government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill to properly present to the grand jury the questions being considered by it.
>
> The Attorney General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys or lawyers do not generally possess, and in cases of usual [sic] importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone.

The judgment below represents a blatant departure from settled rules of statutory construction and compels the grant of certiorari.

5. The Decision Below Raises Significant Issues Concerning the Proper Interpretation and Application of 28 U.S.C. §510.

The question presented also raises serious questions concerning the delegation of authority by the Attorney General pursuant to 28 U.S.C. 510, such as was raised in *United States* v. *Giordano,* 417 U.S. 563 (1974). Section

515(a) provides that the Attorney General shall appoint. In each instance here the letters appointing these strike force attorneys were signed by a deputy attorney general or an assistant attorney general. The court of appeals in a second companion case, *United States* v. *Agrusa,* No. 75-1196 (C.A. 8, July 18, 1975) (App. D, infra), held that the authority was delegable and had been delegated, relying on 28 U.S.C. §510 and 28 C.F.R. §§0.55, 0.60, 0.133.

The Court of Appeals distinguishes *United States* v. *Giordano,* 417 U.S. 563 (1974), stating, contrary to the Second Circuit's decision in *United States* v. *Persico,* supra, at pages 40 and 52, that nothing in 515(a) or in its "legislative history evidences a congressional intent to limit the delegation authority of the Attorney General under 28 U.S.C. §510."

The correctness of this decision is open to serious question. Section 515(a) predates 510 by approximately 43 years. Section 515(a) specifically contemplates a direction by the Attorney General and, as held by the Second Circuit in *United States* v. *Persico,* supra, only in limited and special circumstances. Section 510 was enacted as part of the Reorganization Act of 1949 and the House Report, No. 23, accompanying that bill states clearly with respect to 510:

> "This bill will permit a type of reorganization not authorized under the 1945 act—the granting to any officer of authority to delegate any of his functions. The main purpose is to make it possible for top officials to delegate routine functions which are vested in them by law in such manner as to prevent delegation."

Appointments by the Attorney General pursuant to 515(a) are not routine functions within the meaning of 510. The judgment and opinion below interpret this Court's opinion in *United States* v. *Giordano,* supra, as precluding delegation only when the Congress has specifically so stated. This interpretation is not warranted by the *Giordano* decision and in this instance is precluded by the histories of Sections 510 and 515(a). The grant of certiorari is necessary to place §510 and this Court's decision in *United States* v. *Giordano,* supra, in proper perspective.

CONCLUSION

Both reliance on §515(a) as a source of authority for the strike force, and exercise of the appointive power granted by Congress in §515(a) by persons other than the Attorney General represent continuing abuses of the executive function such as created the constitutional crisis of Watergate. These are activities not condoned by law, contrary to statutory language and Congressional intent. To allow the lower court judgment to stand is to embark on a road to a loss of freedom from which this nation will not recover; it is the first step down the primrose path to a judicial Watergate.

For all of the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1286

Dominick DiGirlomo,
Appellant,
v.
United States of America,
Appellee.

Appeal From the United States District Court
for the Western District of Missouri.

Submitted: May 16, 1975
Filed: July 18, 1975

Before GIBSON, Chief Judge, and HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

Dominick DiGirlomo appeals from an order of the District Court directing that he be placed in confinement for his refusal, without just cause, to comply with a previous order of the court to testify before a federal grand jury. The order of confinement was issued pursuant to

28 U.S.C. §1826(a).[1] The respondent contends, as he did in the court below, that he has "just cause" for his refusal to testify. His defense is premised upon the claim that the special attorneys who conducted the grand jury proceedings were not properly authorized by the Attorney General within the meaning of 28 U.S.C. §515(a). We affirm the order of the District Court.

The grand jury proceedings to which the respondent refused to testify were conducted by Special Attorneys William E. Zleit, Gary T. Cornwell, Philip J. Adams, Jr., and William Tetrick. Each is a full-time government attorney of the Department of Justice. Their authorization to conduct the grand jury proceedings at issue was given by letters of appointment from the office of the Attorney General made pursuant to 28 U.S.C. §515(a). The statute reads:

> * * * The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

---

[1] The statute reads:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. * * *

The letter of appointment to Adams is representative of that received by each special attorney. It reads:

> Dear Mr. Adams:
>
> The Department is informed that there have occurred and are occurring in the Western District of Missouri and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.
>
> As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.
>
> Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.
>
> You are to serve without compensation other than the compensation you are now receiving under existing appointment.
>
> Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.
>
> Sincerely,
>
> Henry E. Petersen
> Assistant Attorney General

The letters to Zleit and Tetrick were also signed by Assistant Attorney General Henry E. Petersen. Cornwell's letter was signed by Acting Assistant Attorney General John C. Keeney.[2]

The respondent contends that the letters of appointment to the special attorneys fail to comply with 28 U.S.C. §515(a) for three reasons. First, the letters are too broad because they do not "specifically direct" the special attorneys within the meaning of the statute. Second, the Attorney General cannot under the statute delegate his powers to a subordinate officer of the Department of Justice. Third, there is no proof that the letters of appointment were actually signed by the purported signators and they should not have been admitted into evidence.

The respondent's first two arguments have been decided adversely to him in *United States of America v. William Wrigley,* No. 75-1235 (8th Cir. July , 1975) and *United States of America v. Salvatore Ross Agrusa,* No. 75-1196 (8th Cir. July , 1975). *Accord, In re Grand Jury Subpoena of Alphonse Persico,* No. 75-2030 (2nd Cir. June 19, 1975). In *Wrigley,* we held that letters of appointment which specifically direct the special attorneys to conduct grand jury proceedings in the Western District of Missouri satisfy 28 U.S.C. §515(a). In *Agrusa,* we held that the Attorney General could, pursuant to 28 U.S.C. §510, delegate his authority under 28 U.S.C. §515(a) to subordinate officers of the Department of Justice. The legal and factual contentions raised here are the same as those previously presented. There is no reason to depart from those holdings here.

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[2] Cornwell received an earlier letter of appointment signed by Deputy Attorney General Richard G. Kleindienst which the respondent contends has been superseded by the later letter. For the purposes of this appeal, we accept the respondent's contention.

The final argument of the respondent is equally unavailing. The letters of appointment received into evidence were copies authenticated by the certificate of the clerk of court and properly admitted. *See United States v. Morris,* 451 F.2d 969, 972 (8th Cir. 1971); *United States v. Hudson,* 479 F.2d 251, 253 (9th Cir. 1972), *cert. denied,* 414 U.S. 1012 (1973); 28 U.S.C. §1733; Federal Rule of Evidence 902, *see* Pub.L.No. 93-595 (January 2, 1975) (effective July 1, 1975); McCormick on Evidence (2nd Ed. 1972) at 557.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

No. 74 CV-456-W-4

IN RE: GRAND JURY PROCEEDINGS,

UNITED STATES OF AMERICA,
Movant,
vs.
DOMINICK DI GIRLOMO,
Respondent.

MEMORANDUM AND ORDER SUSTAINING MOTION FOR CONFINEMENT PURSUANT TO 28 U.S.C. SECTION 1826(a)

(Filed March 26, 1975)

This is an action for civil contempt brought pursuant to Section 1826(a) of Title 28, United States Code, wherein the United States has moved that Dominick Di Girlomo be confined for his refusal without just cause to comply with an order of court to testify before a federal grand jury for this district. Respondent has asserted as a defense to movant's motion that he has "just cause" for his refusal to testify. As his defense of "just cause," respondent asserts that persons other than persons authorized by Rule 6(d) of the Federal Rules of Criminal Procedure were present in the grand jury room during the session of the grand jury wherein he was ordered to testify.[1]

The sole question presented for the Court's determination in this cause is whether Special Attorneys William E. Zleit, Gary Cornwell, William Tetrick, and Phillip Adams, who are assigned to and members of the Kansas City Field Office of the Organized Crime and Racketeering Section, Criminal Division, Department of Justice, are authorized "attorneys for the government," within the meaning of Rule 6(d) of the Federal Rules of Criminal Procedure, entitled to be present while the grand jury is in session.

The facts in this cause have been fully stipulated by the parties. The Court adopts the stipulation of the parties, attached hereto as Appendix A, as its findings of fact.

The question of the authority of attorneys who are members of various Field Offices of the Organized Crime and Racketeering Section, Criminal Division, Department of Justice as it relates to the propriety of their presence while a federal grand jury is in session has recently been raised in a large number of criminal cases in this district and in other districts. See, e.g., United States v. Williams, No. 74 CR-47-W-1 (W.D.Mo.); United States v. Wrigley, No. 74 CR-448-W-1 (W.D.Mo.); United States v. Agrusa, No. 74 CR-269-W-1 (W.D.Mo.); Sandello v. Curran, M 11-188 (S.D.N.Y. Feb. 27, 1975); United States v. Brown, No. 74 CR-867 (S.D.N.Y. Feb. 24, 1975); United States v. Crispino, No. 74 CR-932 (S.D.N.Y. Feb. 13, 1975); In re Persico, 75 CV-96 (E.D.N.Y. Feb. 5, 1975); United States v. Jacobson, No. 74 CR-936 (S.D.N.Y. March 3, 1975); United States v. Ferri, No. 74-277- Criminal (W.D.Pa. Feb. 18, 1975).

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[1] While appearing before the grand jury, respondent asserted numerous grounds as "just cause" for his refusal to testify. These grounds have now been narrowed so that the only ground now asserted is that concerning the presence of unauthorized persons in violation of Rule 6(d), F.R.Crim.P.

Because of the seriousness of the question, and the consequences of a determination adverse to the United States, its presence, unresolved, has caused a substantial impairment to the disposition of a large number of criminal matters wherein attorneys from the Organized Crime and Racketeering Section purport to represent the United States in this Division of the Western District of Missouri, and it is the understanding of the undersigned judge that similar impairments have arisen in a large number of criminal matters in the other divisions of the Court. It is highly in the public interest and necessary to the proper administration of justice that the issue presented herein be resolved at the appropriate appellate level to give direction to the district courts in cases presently pending and in future proceedings. For this reason, a speedy resolution of the question at the appellate level is imperative. It is to this end that the parties to this action and the undersigned judge have attempted to expedite this matter to a final determination in the district court.

The principle which underlies the limitation of Rule 6(d) on persons who may be present while the grand jury is in session is the same as that which underlies the limitation of disclosure of matters occurring before the grand jury provided in Rule 6(e); that is the long established policy to maintain the secrecy of the grand jury proceedings in the federal courts. The reasons for the policy of secrecy first set out in *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931), have been quoted by the Supreme Court with approval in *United States* v. *Proctor & Gamble Co.*, 356 U. S. 677, 681 n. 6, 78 S. Ct. 983, 986 n. 6, 2 L. Ed. 2d 1077 (1958), as follows:

> "In United States v. Rose (CA3 Pa.) 215 F. 2d 617, 628, 629, those reasons were summarized as follows: '(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subordination of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrampled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.' "

The Supreme Court specifically stated in *United States* v. *Proctor & Gamble Co., supra,* 356 U.S. 681-682 that one reason for the long established policy that maintains the secrecy of the grand jury proceedings in the federal courts "is to encourage all witnesses to step forward and testify freely without fear of retaliation." See In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (D.C. Pa. 1971); Posey v. United States, 416 F. 2d 545 (5th Cir. 1969).

Because one of the reasons which underlie the policy of secrecy is to encourage free and untrampled disclosures by witnesses without fear of retaliation, it follows that a witness may object to the presence of unauthorized persons during his testimony before the grand jury. The Court therefore is of the opinion that the presence of unauthorized persons during the session in which a witness is called to testify would, if established, constitute "just cause" for a refusal to testify and a defense to this civil contempt action brought pursuant to Section 1826(a) of Title 28, United States Code.

Rule 6(d) of the Federal Rules of Civil Procedure provides as follows:

> "Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

Those persons encompassed by the term "attorneys for the government" within the context of Rule 6 of the Federal Rules of Criminal Procedure are set forth in Rule 54(c) of those Rules as follows:

> "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein."

Although the provisions of Rule 54(c), F.R.Crim.P. appear at first glance to specifically define and limit those persons authorized to be present while the grand jury is in session as "attorney for the government", the Rule must be read in connection with the various statutes pertaining to the Department of Justice, the Solicitor General, Assistants to the Attorney General, Assistant Attorneys General, Conduct of Legal Proceedings on behalf of the United States, Counsel to aid United States Attorneys, United

States Attorneys, Assistant United State Attorneys, and the duties of the officers of the Department of Justice. See Original Advisory Committee Notes to Rule 54(c), F.R.Crim.P., 8A Moore, Federal Practice, ¶ 54.01(2), 54-13 to 54-14 (1974 ed.).[1]

Movant asserts as authority for the presence during the grand jury session of the attorneys for the Kansas City Field Office of the Organized Crime and Racketeering Section Section 515(a) of Title 28, United States Code. That statute formerly codified in substantially the same form as 5 U.S.C. § 310, provides as follows:

> "The Attorney General or any other officer of the Department of Justice or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before com-

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[1] The Advisory Committee Notes to Original Rule 6(d) provide that "This Rule generally continues the existing law. See 18 U.S.C. § 556 (Indictments and presentments; defects in form) (as amended now 18 U.S.C. §§ 3288-2389) and 5 U.S.C. 310 (Conduct of Legal Proceedings) (as amended now 28 U.S.S. § 515(a))."

In view of the fact that the Original Advisory Committee Notes to Rules 6(d) and 54(c), F.R.Crim.P. make specific reference to statutes then existing and presently existing in amended form, and in view of the fact that Section 515(a) of Title 28 (formerly Section 310 of Title 5) was reenacted in its present form in 1966, the Court does not deem those statutes which empowered and presently empower persons other than the "Attorney General" an "authorized Assistant of the Attorney General" a "United States Attorney" and an "authorized assistant of a United States Attorney" as those persons are defined by statute, to be present while the grand jury is in session repealed by reason of "conflict" with Rule 54(c). See 28 U.S.C. 3771; see, e.g. Davis v. United States, 411 U.S. 233, 36 L.Ed. 2d 216, 93 S.Ct. 1577 (1973). However, a clarification of the provisions of Rule 54(c) concerning "attorney for government" would appear to be in order to relieve any doubt concerning those persons actually deemed "attorney for the government" within the context of Rule 6(d) and (e). See 8 Moore, *Federal Practice,* ¶ 6.05, 6-55 to 6-57 (1974 ed.).

> mitting magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought."

If attorneys William E. Zleit, Gary Cornwell, William Tetrick, and Phillip Adams have been specially appointed in accordance with the provisions of Section 515(a) they are authorized under Rules 6(d) and 54(c) to be present while the grand jury is in session. It is the validity of their appointments which constitutes the key issue in this case.

The authorization of attorneys of the Kansas City Field Office pertinent herein is in the form of a letter to each of the attorneys whose authorization has been challenged.

The authorizations of Messrs. Zleit, Cornwell, Tetrick, and Adams, are contained in identically worded letters of appointment under date of January 2, 1973; August 2, 1974; August 9, 1974; and June 25, 1973 respectively. Those letters provide in pertinent part as follows:

> "The Department is informed that there have occurred and are occurring in the Western District of Missouri and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.
>
> "As an attorney at law you are specifically retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specifically authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

> "Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.
>
> "You are to serve without compensation other than the compensation you are now receiving under existing appointment."[1]

The letters of appointment to Messrs. Zleit, Tetrick and Adams are purportedly signed by Henry E. Petersen, Assistant Attorney General. The most recent letter to Mr. Cornwell is purportedly signed by John C. Keeny, Acting Assistant Attorney General.

Following receipt of their letter of appointment, Messrs. Zleit, Cornwell, Tetrick, and Adams, executed and filed with the Clerk of the Court an oath of office of Special Attorney pursuant to their letter of authorization.

In the stipulation filed in this cause, respondent has challenged the due execution of the mentioned letters of appointment by the purported signators—Henry E. Peterson, Assistant Attorney General, and John C. Keeney, Acting Assistant Attorney General. Further, respondent has challenged the authority of the persons who purportedly signed the letters of appointment to make such an appointment on the grounds that the power of the Attorney General to appoint Special Attorneys under Section 515(a) is not a delegable power, and in any event has not been properly delegated.

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[1] Mr. Cornwell by letter under date of December 14, 1970, purportedly signed by Richard G. Kleindienst, Deputy Attorney General, was similarly appointed to conduct legal proceedings with somewhat more specificity as to the violations of federal criminal statutes which the Department was informed to have been violated.

The Court is in agreement with the portions of the decisions in *United States* v. *Crispino,* 73 Cr. 932 (S.D. N.Y., February 13, 1975); *United States* v. *Brown,* 74 Cr. 867 (S.D.N.Y. February 24, 1975); and *Sandello* v. *Curran,* No. M 11-188 (S.D.N.Y. February 27, 1975) holding that the power to appoint special attorneys under Section 515(a) may be delegated by the Attorney General to another "officer" of the Department of Justice. 28 U.S.C. § 510. And, the Court is of the opinion that delegation of power from the Attorney General to the Assistant Attorney General Criminal Division and in the case of the appointment of Mr. Cornwell to the Deputy Attorney General and Acting Assistant Attorney General was in all respects proper. 28 C.F.R. §§ 0.55, 0.60. May v. United States, 236 F. 495 (8th Cir. 1916); Sandello v. Curran, *supra;* United States v. Brown, *supra;* see United States v. Crispino, *supra.*

Regarding the question of whether the letters of appointment were in fact executed by the purported signators, Henry E. Peterson (Assistant Attorney General), John C. Keeney (Acting Assistant Attorney General), and Richard G. Kleindienst (Deputy Attorney General), the parties hereto have stipulated that the letters be received into evidence in this cause with respondent's denial of their due execution by the purported signator. The evidence herein establishes that at the time the letters of appointment were executed the persons whose purported signatures appear thereon held the position as an officer in the Department of Justice indicated in the signature block of the letter. There is no evidence whatsoever to indicate that the signatures appearing on the letters of appointment are not those of the persons indicated. The letters of appointment here in question and the accompanying executed oaths of office were filed with the United States District Court for the Western District of Missouri on the filing dates which appear thereon (Mr. Zleit on January 10, 1973; Mr. Cornwell on August 13, 1974 and December 23, 1970; Mr. Tetrick on August 27, 1974; Mr. Adams on August 3, 1973). The authenticity of the copies introduced in evidence herein have been attested by the Clerk of the United States District Court for the Western District of Missouri. A presumption of regularity attaches to these letters, and they are authorized to be filed in the Clerk's office for this District, *May* v. *United States, supra.* Furthermore, in regard to the authenticity of the signature of Henry E. Peterson, the Court received into evidence a letter bearing his signature in these proceedings on August 16, 1974. Comparison of the signatures on the letters of appointment in question with that on the letter from Mr. Peterson previously received into evidence indicates that the letters of appointment bearing the signature of Mr. Peterson were in fact executed by him. See Rule 901, *Federal Rules of Evidence.* Under the circumstances, the Court deems the letters of appointment of Messrs. Zleit, Cornwell, Tetrick, and Adams to be authentic and in fact executed by the persons indicated thereon.

The remaining question in this cause is whether the letters of appointment to attorneys Zleit, Cornwell, Tetrick, and Adams were executed in compliance with Section 515(a) so as to authorize them to conduct legal proceedings, including grand jury proceedings in this District. Although, as previously stated, this precise question involving similar letters of appointment has been and is presently being raised throughout the nation, the interpretation of Section 515(a) and its prior codification, 5

U.S.C. Section 310, is not a novel area of the law. See e.g. May v. United States, 236 F. 495 (8th Cir. 1916); Lathan v. United States, 226 F. 420 (5th Cir. 1915), Hale v. United States, 25 F. 2d 430 (8th Cir. 1928); United States v. Houston, 28 F. 2d 451 (N.D. Ohio 1928); United States v. Goldman, 28 F. 2d 424 (D. Conn. 1928); United States v. Morse, 292 F. 273 (S.D.N.Y. 1922); Shushan v. United States, 117 F. 2d 110 (5th Cir. 1941); cert. den. 313 U.S. 474, reh. denied 314 U.S. 706; United States v. Hall, 145 F. 2d 781 (9th Cir. 1944); United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948); United States v. Morton Salt, 216 F. Supp. 250 (D. Minn. 1962), aff'd 382 U.S. 44 (1965). In *Hale* v. *United States*, 25 F. 2d 430 (1928) the Eighth Circuit Court of Appeals held that a "Special Assistant to the Attorney General" authorized under Section 310 of Title 5, the previous codification of § 515(a) was properly present during grand jury proceedings as a stenographer. The letter of appointment of the special attorney in *Hale* is recited in that decision to have provided as follows:

> ". . . (T)he Attorney General by written Order, had appointed him a special assistant to the Attorney General of the United States to assist in the trial of cases in which the government was interested and specifically 'to conduct, in the Western District of Oklahoma, and in any other judicial district or districts where the jurisdiction thereof lies, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before a committing magistrate, which district attorneys are authorized by law to conduct.' "

Without discussion of the absence of "specificity" in the attorney's appointment, the Court of Appeals stated:

> "A district attorney or Assistant Attorney General may be present throughout an inquest without personal participation, but no one on that ground could challenge their right to be present, provided they do not participate in the deliberations of that body." * * * Wilson v. United States (C.C.A. 2) 229 F. 344; Wilkes v. United States (C.C.A. 6) 291 F. 988, 992; May v. United States (C.C.A. 8) 236 F. 495."

Most decisions which have examined various letters of appointment to determine their compliance with the provisions of Section 515(a) or Section 310, have examined the letters to determine if the special attorneys were acting within their specific direction by the Attorney General so as to authorize them to conduct particular legal proceedings on behalf of the United States. The issue raised in the instant cause is that the letters of appointment are too broad and thus the attorneys are not "specifically directed" in the context of Section 515(a). See, e.g., United States v. Crispino, *supra;* United States v. Amazon Industrial Chemical Corp., 55 F. 2d 254 (D.C. Md. 1931); United States v. Hall, 145 F. 2d 781 (9th Cir. 1944); United States v. Morse, 292 F. 2d 273 (S.D.N.Y. 1922); United States v. Goldman, 28 F. 2d 451 (N.D. Ohio 1928). The decisions indicating preference for specific direction in reference to the activities to be performed or the place of performance have involved "officers of the Department of Justice" and "attorneys specially appointed". See e.g. United States v. Hall, *supra;* United States v. Morton Salt Company, *supra;* United States v. Crispino, *supra.*[1]

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[1] Prior to April 17, 1930, attorneys appointed under the provisions of the statute now codified as 28 U.S.C. § 515 were known as "special assistants to the Attorney General". On April 17, 1930, Congress amended then Section 315 of Title 5 to provide that these attorneys may also be appointed as "special attorneys". The amendment did not provide authority for new appointments but merely permitted appointments as "special attorney" where the Attorney General felt that it was undesirable to use the term "special assistant to the Attorney General." H.R. Rep. No. 229, 71st Cong., 2nd Sess. (1930).

The statute which is presently codified as Section 515(a) of Title 28, was enacted by Congress in substantially the same form as the Act of June 30, 1906, 34 Stat. 816 to counteract the decision in *United States* v. *Rosenthal*, 121 F. 862 (C.C. S.D.N.Y. 1903) which held that a "special assistant to the Attorney General" was not authorized by statute to "conduct proceedings before the grand jury," and stated that the Attorney General himself was excluded from proceedings before grand juries. United States v. Rosenthal, *supra* at 867. See *Confiscation Cases,* 73 U.S. (7 Wall.) 454, 457-58 (1868). Those decisions which have expressed the view that an appointment of a special attorney under later codifications of the Act of June 30, 1906 must contain a degree of specific direction concerning the activities of the attorney have in part gleaned the requirement from the legislative background of the statute. See, e.g., United States v. Williams, *supra;* United States v. Wrigley, *supra;* United States v. Crispino, *supra;* United States v. Houston, *supra;* United States v. Goldman, *supra.* Other recent decisions have reached the conclusion that the legislative history fails to establish the intent of Congress to impose a requirement of specificity. Sandello v. Curran, *supra;* United States v. Brown, *supra;* United States v. Weiner, 74-CR-336 (N.D. Ill., Mar. 17, 1975).

As an additional basis for the requirement of specificity, the view has been expressed that without such a requirement the Attorney General could appoint attorneys under Section 515(a) with a "roving commission" without any limitations and thus allow them to supersede the local United States Attorneys and their regular assistants. See United States v. Goldman, *supra* at 430; United States v. Crispino, *supra* at 21-22; see also United States v. Wrigley, No. 74 Cr-488 W-1 (W.D. Mo., March 11, 1975).

The Court has thoroughly reviewed the legislative history pertaining to the Act of June 30, 1906. Clearly, at that time, Congress was cautious in granting the Attorney General power to appoint special attorneys who were empowered to conduct legal proceedings which "district attorneys" were authorized to conduct. And, concern was expressed over the provisions which permitted these attorneys to appear before the grand jury. See H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906).[1] However, the Court respectfully disagrees with the view that the requirement of specificity as contained in *United States* v. *Crispino, supra,* will in some manner prevent the Attorney General from superseding the historic function of the United States Attorney and his appointed assistants or is necessary to achieve that purpose. Congress has since 1906 vested the Attorney General of the United States with enormous power, and has imposed on the person holding that office the duties and public trust that accompany that power. See, e.g. 28 U.S.C. §§ 509, 519, 526, 542, 547. Congress has clearly vested the Attorney General with the raw power to supersede the functions of the local United States Attorneys, and subjected them to his supervision. Although it may be said that Congress in 1906 was concerned with the usurpation of the functions of the local District Attorneys by the Attorney General and his assistants, this concern appears to have dissipated when in 1948 Congress expressly vested the Attorney General with complete control over all criminal prosecutions Act of June 25, 1948, c. 646, § 1, 62 Stat. 910, formerly 28 U.S.C. § 507(b).

In the last 70 years, Congress has reacted to the increase in criminal activity by enacting an untold number of criminal statutes and by several reorganizations of the Department of Justice. See, e.g. Act of June 25, 1948, c. 646, 62 Stat. 910; Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 614. One of the results of these reorganizations has been a system whereby complex internal procedures of the Department of Justice provide direction and supervision to United States Attorneys, their assistants, and attorneys appointed pursuant to Sections 515 and 543 of Title 28. Although a need for written specificity of functions may have existed in 1906 to provide direction and supervision to attorneys appointed under the act of June 30, 1906 and as a device to give notice of the attorney's function to persons concerned, including then District Attorneys, that method of providing direction, supervision, and notice, has been long replaced by the internal workings of the Department of Justice.[1] Congress has long since abandoned the view that local United States Attorneys and their assistants maintain a strong independence from the Department of Justice or the Attorney General, and has chosen instead to combat criminal activities through a strong, centrally organized Department of Justice. See 28 U.S.C. § 501-550. The internal workings of the Department of Justice, do now, and have for some time, provided direction and supervision to attorneys appointed under the provisions of Section 515. To require the specificity suggested by respondent and in *United States* v. *Crispino, supra,* would, in the opinion of the Court, do nothing to enhance this direction and supervision, and would merely impose a requirement on the Department of Justice to further hinder the enforcement of the criminal laws of the United States. See United States v. Weiner, *supra.* As stated in Wilson v. United States, 229 F. 344, 348 (2nd Cir. 1916) concerning the presence of a stenographer in the grand jury room as a basis for the quashing of an indictment.

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[1] An excellent and detailed recitation of the legislative history surrounding the Act of June 30, 1906, and related statutes is ofund in *United States* v. *Crispino, supra.*

> "To do so would seem like a reverter to strict technicalities, overattention to which sometimes tends to defeat rather than to advance the ends of justice. There seems no reason why criminal law and procedure should not, like other law and procedure, progress with the progress of the age. Presumably, no court today would set aside a righteous verdict for the reasons which appeared convincing to Mr. Justice Taney in United States v. Dow, 25 Fed. Case 901."

It is the opinion of this Court that Congress has by vesting the Attorney General with the power and responsibility over the enforcement of the criminal laws of the United States, evidenced an intent to empower him to make the broad Section 515 appointments of the type here challenged. See United States v. Weiner, *supra;* United States v. Brown, *supra;* Sandello v. Curran, *supra.* For that reason, and for the additional reasons stated herein, the Court finds the appointment of Messrs. Zleit, Cornwell, Adams, and Tetrick under the provisions of Section 515(a) of Title 28, United States Code, to be in all respects proper, and therefore their presence during the grand jury session authorized by the provisions of Rule 6(d), Federal Rules of Civil Procedure.[1]

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[1] In the context of attorneys assigned to the Kansas City Field Office of the Organized Crime and Racketeering Section, Criminal Division, Department of Justice, they are subject to supervision by their immediate superior and by a heirarchy which runs to the Assistant Attorney General, Criminal Division. And, as pointed out in regard to attorneys holding similar positions in the Northern District of Illinois in *United States* v. *Weiner, supra,* the special attorneys in this district are prevented from superseding the function of the local United States Attorneys by the internal procedures of the Department of Justice. For example, all motions and pleadings filed in these proceedings, like other proceedings wherein the United States has been represented by attorneys from the Kansas City Field Office, bear the signature of the United States Attorney for this District or one of his authorized assistants; and all indictments returned by grand juries wherein the proceedings are conducted by attorneys for the Kansas City Field Office are signed by the United States Attorney or one of his authorized assistants.

It is undisputed that on August 16, 1974, respondent Dominick Di Girlomo did fail to comply with the Court's order entered on that same date directing him to appear and testify before the grand jury. For the reasons stated in this Memorandum and Order, the Court finds that respondent has not shown just cause for his refusal to testify pursuant to the Order of this Court. Accordingly, it is hereby:

ORDERED that Dominick De Girlomo be confined for the term of the grand jury, or for eighteen months, whichever is shorter, or until such time as he is willing to comply with the Order of Court directing his appearance and testimony before the grand jury. Due to the substantial question of law presented by respondent, it is further

ORDERED that respondent Dominick De Girlomo be released on bail from the Court's Order of Confinement pending the determination of this matter on appeal to the Eighth Circuit Court of Appeals. Respondent is released on his personnel recognizance on the conditions that he appear at all times as ordered by the Court and keep his counsel notified as to his whereabouts so that counsel can notify him when a Court appearance is required.

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[1] As an additional reason for this conclusion, the Court notes that Mr. Michael DeFeo, Attorney in Charge of the Kansas City Field Office has been stipulated to be the direct supervisor of Messrs. Zleit, Cornwell, Adams and Tetrick. The letter of appointment of Mr. DeFeo on file with the Clerk of the Court does contain specific direction concerning the criminal statutes which he is appointed to enforce. See United States v. Williams, *supra*. The letter to Mr. DeFeo is clearly sufficiently specific under the rationale of *United States* v. *Morse, supra,* and this observation was so expressed by Judge Werker in *United States* v. *Crispino*. Under the rationale of *United States* v. *Hall*, 145 F. 2d 781 (9th Cir. 1944), the Authorization to Mr. DeFeo, the direct supervisor of Messrs. Zleit, Tetrick, Cornwell and Adams, is sufficient to authorize those subordinates to appear and conduct any kind of legal proceedings within Mr. DeFeo's authorization, including grand jury proceedings.

Dated: March 26, 1975.

/s/ Elmo B. Hunter
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 74-CV-456-W-4

IN RE: GRAND JURY PROCEEDINGS, UNITED STATES OF AMERICA,
Movant,

v.

DOMINICK DI GIRLOMO,
Respondent.

STIPULATION

It is hereby stipulated and agreed between the United States of America, Movant, and Dominick Di Girlomo, Respondent, that:

1. This is an action under 18 U.S.C. §1826 brought by the United States, Movant, for confinement of Respondent Dominick Di Girlomo.

2. That Dominick Di Girlomo appeared before the Federal Grand Jury for the Western District of Missouri pursuant to subpoena, wherein he refused to testify based upon his privilege against self-incrimination, as reflected by the attached grand jury transcript of August 14, 1974, Exhibit 1.

3. That on August 15, 1974, Dominick Di Girlomo appeared before the United States District Court for the Western District of Missouri, as reflected in the attached hearing transcript of August 15, 1974, Exhibit 2. At that time a motion to compel his testimony was filed, with an accompanying letter of authorization (Exhibits 3 and 4), and a copy of the above described grand jury testimony of August 14, 1974.

4. That on August 16, 1974, Dominick Di Girlomo reappeared before the United States District Court for the Western District of Missouri, represented by retained counsel, Lawrence H. Pelofsky. At this time the above described letter of authorization, Exhibit 4, was received into evidence, as well as the grand jury transcript of August 14, 1974, Exhibit 1. At that time and after the evidentiary hearing and findings reflected in the attached hearing transcript of August 16, 1974, Exhibit 5, the Court entered the oral Order of immunity reflected therein and executed the written Order attached as Exhibit 6.

5. That on August 16, 1974, subsequent to the proceedings described in Paragraph 3 above, Dominick Di Girlomo reappeared before the Grand Jury and refused to testify based upon a claim that his rights under the Fourth Amendment to the Constitution were being violated by questioning based upon illegal electronic surveillance as reflected in the grand jury transcript of August 16, 1974, Exhibit 7.

6. That on October 22, 1974, Dominick Di Girlomo reappeared before the Grand Jury and refused to testify until promised a copy of any testimony he might give before the grand jury and based upon a claim that his rights under the Fourth Amendment to the Constitution and under 18 U.S.C. §2515 and §3405 were being violated by such questioning, as reflected in the grand jury transcript of October 22, 1974, Exhibit 8.

7. That the United States has been represented during the grand jury proceedings and courtroom appearances described above by Special Attorneys William E. Zleit, Gary Cornwell, William Tetrick and Philip Adams, whose letters purporting to appoint them and oaths of office were filed with the United States District Court for the Western District of Missouri on the dates indicated, and which appear as Exhibits 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

8. That the preceding Exhibits 1, 2, 5, 7 and 8 are true and accurate typewritten transcripts of stenotype notes made by Certified Shorthand Reporters Elaine Cannon and Bonnie Jeffries at the times and occasions described and are admitted as accurately reflecting the events recorded without further proof of authenticity or foundation.

9. The Assistant United States Attorneys serving upon the staff of United States Attorney Bert C. Hurn have been selected and interviewed by Mr. Hurn or his predecessor United States Attorneys for the Western District of Missouri.

10. Attorneys of the Kansas City Field Office of the Organized Crime and Racketeering Section are not so selected, and are interviewed and hired by officials of the Department of Justice in Washington and thereafter assigned to the Kansas City Field Office, Organized Crime and Racketeering Section, Criminal Division.

11. That Special Attorneys William Zleit, Gary Cornwell, William Tetrick and Philip Adams are not United States Attorneys appointed pursuant to 28 U.S.C. §541.

12. That Special Attorneys William Zleit, Gary Cornwell, William Tetrick and Philip Adams are not Assistant United States Attorneys appointed under 28 U.S.C. §542.

13. That Special Attorneys William Zleit, Gary Cornwell, William Tetrick and Philip Adams are assigned to and members of the Kansas City Field Office of the Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice.

14. That Special Attorney Michael De Feo is the Attorney in Charge of the Kansas City Field Office, Organized Crime and Racketeering Section.

15. That Michael De Feo is not a United States Attorney appointed pursuant to 28 U.S.C. §541.

16. That Michael De Feo is not an Assistant United States Attorney appointed pursuant to 28 U.S.C. §542.

17. That Special Attorneys William Zleit, Gary Cornwell, William Tetrick and Philip Adams are under the supervision of Michael De Feo, Attorney in Charge, Kansas City Field Office.

18. That Bert C. Hurn is the United States Attorney for the Western District of Missouri, appointed pursuant to 28 U.S.C. §541.

19. That the stationery of the office of the United States Attorney for the Western District of Missouri is different from that utilized by the Kansas City Field Office of the Organized Crime and Racketeering Section.

20. That the budget of the Kansas City Field Office of the Organized Crime and Racketeering Section is separate from that of the United States Attorney for the Western District of Missouri, as are its physical quarters.

21. That examination of Dominick Di Girlomo before the Grand Jury was conducted by Special Attorneys of the Kansas City Field Office of the Organized Crime and Racketeering Section and not by the United States Attorney for the Western District of Missouri or a member of his staff, and as reflected by Exhibits 1, 7, 8.

22. That the geographic scope and activities of the Kansas City Field Office of the Organized Crime and Racketeering Section include districts other than the Western District of Missouri, specifically including but not limited to the District of Kansas.

23. That the letters of authorization customarily utilized for Special Attorneys of the Kansas City Field Office in these other districts are substantially identical in form and content to those filed in the Western District of Missouri.

24. That Special Attorneys of the Kansas City Field Office are employed as trial attorneys of the Department of Justice, all receive annual salaries in excess of $12,000, and receive no additional compensation under the letters purporting to appoint them as Special Attorneys.

25. That all motions and pleadings filed on behalf of the United States in these proceedings bear a signature purporting to be that of the United States Attorney for the Western District of Missouri, or of one of his Assistant United States Attorneys within the meaning of 28 U.S.C. §542, the authenticity and due execution of which is not admitted.

26. That Special Attorneys of the Kansas City Field Office do not have and have not filed letters personally signed by the then Attorney General. Stipulated Exhibits 9-18 are not letters personally signed by the then Attorney General and Movant has no evidence to prove they were

personally and individually considered by the Attorney General.

27. That Movant's counsel have requested from the Criminal Division of the Department of Justice any additional evidence of authorization of the Special Attorneys described above to appear and conduct proceedings in the Western District of Missouri, and have been furnished with none save certain payroll and job description records, upon which Movant does not rely as establishing the authorization of said Special Attorneys to appear and conduct proceedings in the Western District of Missouri.

28. The establishment and location of the Kansas City Field Office of the Organized Crime and Racketeering Section are not known to Movant or Respondent's counsel to be specifically mentioned in any regulation published in the Code of Federal Regulations.

29. Exhibit 20 is an accurate copy of a portion of the 1972 report of the Attorney General of the United States published by the United States Department of Justice.

30. Exhibit 21a is an accurate copy of pages 298-319 of the United States Government Manual, 1974-1975, published by the Office of the Federal Register.

31. That the following Exhibits are accurate copies of the reports, bills, statutes or publication reflected therein:

Exhibit 21—House Report No. 2901, April 4, 1906, together with Chapter 3935, June 30, 1906.

Exhibit 22—Chapter XXXVII, August 2, 1861, together with The Congressional Globe, July 11, 16, 31, 1861.

Exhibit 23—Ch. 121, 1869.

Exhibit 24—Ch. XXV, April 10, 1896, together with the Congressional Globe, April 8, 9 and 10, 1868.

Exhibit 26—Chap. CL, June 22, 1970.

Exhibit 26—The Congressional Globe, April 27 and 28, 1870.

Exhibit 27—Cr. 252, 1896.

Exhibit 28—Tit. 8, Sec. 354-370.

Exhibit 29—Ch. 24, 1919.

Exhibit 30—Ch. 174, April 17, 1930, and House Report No. 229.

Exhibit 31—Chapter 31, Title 28, together with Pages A58-A65, Revision of Title 28, United States Code.

Exhibit 32—Public Law 195, August 5, 1953.

32. The Kansas City Field Office of the Organized Crime and Racketeering Section does not receive specific written or oral instructions as to each individual concerning whom it conducts pre-indictment investigative activity.

33. That on November 26, 1974, the United States filed a Motion and Suggestions in Support Thereof For Confinement Under 28 U.S.C. §1826, with a supporting affidavit of Special Attorney William Zleit, Exhibit 19.

34. That on January 10, 1975, the Honorable Elmo B. Hunter, United States District Judge, entered the Memorandum and Order attached as Exhibit 19a.

Exhibits

The admission of the following documents into evidence is hereby stipulated:

1. Grand jury transcript of Dominick Di Girlomo, August 14, 1974, accuracy of which is admitted.

2. Hearing transcript of August 15, 1974, accuracy of which is admitted.

3. Motion to compel testimony of Dominick Di Girlomo filed August 15, 1974, authenticity and filing of which is admitted.

4. Letter of authorization bearing signature "Henry E. Petersen" filed with Exhibit 3 above. Respondent denies the due execution of this document by the purported signator.

5. Hearing transcript of August 16, 1974, accuracy of which is admitted.

6. Written Order of this Court conferring immunity upon Dominick Di Girlomo, dated August 16, 1974, authenticity of which is admitted.

7. Grand Jury transcript of Dominick Di Girlomo, August 16, 1974, accuracy of which is admitted.

8. Grand Jury transcript of Dominick Di Girlomo, October 22, 1974, accuracy of which is admitted.

9. Oath of office of Special Attorney William Zleit filed January 10, 1973.

10. Accompanying letter of appointment dated January 2, 1973. Respondent denies the due execution of this document by the purported signator.

11. Oath of office of Special Attoney Gary Cornwell filed December 23, 1970.

12. Accompanying letter of appointment dated December 23, 1970. Respondent denies the due execution of this document by the purported signator.

13. Oath of office of Special Attorney Gary Cornwell filed August 13, 1974.

14. Accompanying letter of appointment dated August 2, 1974. Respondent denies the due execution of this document by the purported signator.

15. Oath of Office of Special Attorney William Tetrick filed August 27, 1974.

16. Accompanying letter of appointment dated August 9, 1974. Respondent denies the due execution of this document by the purported signator.

17. Oath of Office of Special Attorney Philip J. Adams filed August 3, 1973.

18. Accompanying letter of appointment dated June 25, 1973. Respondent denies the due execution of this document by the purported signator.

19. Motion, Suggestion for Confinement and Affidavit of Special Attorney William Zleit, dated November 26, 1974, the authenticity of which is admitted, but the contents of which are not admitted by Respondent.

19a. Court's Memorandum and Order of January 10, 1975.

20. Portion of 1972 Report of the Attorney General, published by the United States Department of Justice.

21. House Report No. 2901, April 4, 1906, together with Chapter 3935, June 30, 1906.

21a. Government Manual, 1974-1975, pages 298-319.

22. Chapter XXXVII, August 2, 1861, together with The Congressional Globe, July 11, 16, 31, 1861.

23. Ch. 121, 1869.

24. Ch. XXV, April 10, 1869, together with The Congressional Globe, April 8, 9 and 19, 1961.

25. Chap. CL, June 22, 1870.

26. The Congressional Globe, April 27 and 28, 1870.

27. Ch. 252, 1869.

28. Tit. 8, Sec. 354-370.

29. Ch. 24, 1919.

30. Ch. 174, April 17, 1930, and House Report No. 229.

31. Chapter 31, Title 28, together with Pages A58-A65, Revision of Title 28, United States Code.

32. Public Law 195, August 5, 1953.

33. Affidavit of Michael De Feo, originally signed and filed with Movant's Motion to Modify of January 21, 1975, the jurat of which not executed on that date and which is re-executed, sworn and filed on this date, the authenticity of which is admitted but the contents of which are not admitted by Respondent.

Attorneys for Movant
United States.

/s/ Bert C. Hurn
Bert C. Hurn
United States Attorney
Western District of Missouri

/s/ Lawrence Pelofsky
Lawrence Pelofsky
Attorney for Respondent
Dominick Di Girlomo

/s/ Michael De Feo
Michael De Feo
Special Attorney
Department of Justice

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

No. 74 CV 456 W-4

IN RE: GRAND JURY PROCEEDINGS.
UNITED STATES OF AMERICA,
Movant,

vs.

DOMINICK DI GIRLOMO,
Respondent.

ORDER AMENDING COURT'S MEMORANDUM AND ORDER SUSTAINING MOTION FOR CONFINEMENT

The Court's Memorandum and Order Sustaining Motion for Confinement filed herein on March 26, 1975, is hereby modified and amended as follows:

Page 17, Footnote 1 is deleted.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1235

United States of America,
Appellant.
v.
William Robert Wrigley,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: June 13, 1975
Filed: July 18, 1975

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

William Robert Wrigley was charged by indictment with knowingly making false material declarations before a grand jury in violation of 18 U.S.C. §1623. He pleaded not guilty. By motion, pursuant to Federal Rule of Criminal Procedure 12(b), he challenged the authority of Special Attorneys Philip J. Adams, Jr. and Gary T. Cornwell, both full-time government attorneys of the Department of Justice, to conduct the grand jury proceedings from which the indictment issued. The defendant asserted, and the District Court held, that the special attorneys were not "attorneys for the government" entitled to be present before the grand jury under Federal Rule of Criminal Procedure 6(d). An "attorney for the government" is defined as, *inter alia,* "an authorized assistant of the Attorney General." F.R.Crim.P. 54(c). The District Court reasoned that the special attorneys were not "authorized" assistants of the Attorney General empowered to conduct grand jury proceedings within the meaning of 28 U.S.C. §515(a) and dismissed the indictment.[1] The government appeals. We reverse.

Section 515(a) of Title 28, United States Code, provides:

> * * * The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Special Attorney Adams was appointed by letter of authorization which reads:

> Dear Mr. Adams:
>
> The Department is informed that there have occurred and are occurring in the Western District of Missouri and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.
>
> As an attorney at law you are specially retained and appointed as a Special Attorney under the au-

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[1] The indictment in the instant case was signed by Special Attorney Cornwell and the United States Attorney for the Western District of Missouri.

thority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.[2]

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,

Henry E. Petersen
Assistant Attorney General[3]

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[2] 2. We do not view the letter of appointment as granting the special attorneys a roving commission to prosecute federal offenses throughout the United States. The letter directs them to conduct legal proceedings in the Western District of Missouri. That was done here. *Cf. United States v. Huston,* 28 F.2d 451 (N.D. Ohio 1928).

[3] 3. The defendant does not contend that the Attorney General could not delegate his authority under the statute to a subordinate officer of the Department of Justice. Accordingly, that issue is not before us. *Cf. Dominick DiGirlomo v. United States of America,* No. 75-1286 (8th Cir. July, 1975); *United States of America v. Salvatore Ross Agrusa,* No. 75-1196 (8th Cir. July, 1975).

Cornwell was appointed in a substantially identical letter signed by John C. Keeney, Acting Assistant Attorney General. Each attorney executed the oath of office before entering upon his duties in the Western District of Missouri. The government asserts that the letters of appointment and oath of office satisfy 28 U.S.C. §515(a).

The defendant's argument focuses upon the statutory language "when specifically directed by the Attorney General." He asserts that the letters of appointment are too broad and fail to give specific direction in the grant of authority.[4] He argues that the statute limits the employment of special attorneys to particular types of cases identified by the Attorney General as unusually important or as requiring particular expertise not possessed by the local United States Attorney. To read the statute otherwise, he reasons, would allow the Attorney General to usurp, through the appointment of special attorneys, the function of the United States Attorneys.[5] Accordingly, he contends that the appointments here, being without limitation as to the type of case to be prosecuted, are invalid.[6] He principally relies, as did the District Court, on *United States of America v. Philip Crispino,* No. 74 Cr. 932 (S.D. N.Y. February 13, 1975) and *United States of America v. Raymond J. Dulski, et al.,* 17 Cr.L. 2219 (E.D. Wis. May 23, 1975) (No. 74-CR-100).

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[4] 4. In many of the reported decisions construing 28 U.S.C. §515(a), the contention has been that the grant of authority to the special attorney was too narrow to encompass the activity challenged and that the special attorney had exceeded the scope of the Attorney General's direction. *See Shushan v. United States,* 1117 F.2d 110 (5th Cir.), *cert. denied,* 313 U.S. 574 (1941) (indictment of persons not named in letter of appointment); *United States v. Amazon Industrial Chemical Corp.,* 55 F.2d 254 (D. Md. 1931) (same); *United States v. Huston, supra* (not authorized by letter of appointment to proceed in district); *United States v. Morse,* 292 F. 273 (S.D. N.Y. 1922) (indictment of persons not named in letter of appointment).

[5] 5. The United States Attorneys are empowered to prosecute all offenses against the United States in their districts. 28 U.S.C. §547. They, like the Attorney General, are appointed by the President with the advice and consent of the Senate. 28 U.S.C. §§503, 541.

The defendant's argument is statutory. He does not contend that the Attorney General is without power to employ special attorneys under more restrictive letters of appointment. Neither does he contend that the actions of the special attorneys caused him demonstrated prejudice nor deprivation of a constitutional right. He argues simply that the Attorney General is without power under the statute to employ special attorneys with the broad grant of authority "to conduct * * * any kind of legal proceeding * * * which United States Attorneys are authorized to conduct."

The statute, originally codified as 5 U.S.C. §310, was enacted in response to *United States v. Rosenthal,* 121 F. 862 (S.D. N.Y. 1903). There the Merchants' Association of the City of New York, concerned with possible fraudulent importations of Japanese silks, prevailed upon the Attorney General to appoint Mr. W. Wickham Smith, a private attorney, to investigate the matter. The appointee's investigation was conducted independently of the Merchants' Association, although that group agreed to compensate him should the Attorney General be unable to pay for his services. Armed with this commission, grand jury proceedings were initiated that resulted in indictments.

Faced with this factual situation, the court posed the legal issue presented: "* * * what *authority* did the appointment vest in [the appointee]?" (Emphasis added.) *Id.* at 865. A survey of the statutes found the Attorney General without power to appoint special attorneys authorized to appear before grand juries and the indictments were quashed. The court's holding required a technical and narrow construction of the prevailing law which empowered the Attorney General and his officers to " 'conduct and argue any case in any court'." *Id.* at 866. It was held that a grand jury proceeding was not a "criminal case," distinguishing *Counselman v. Hitchcock,* 142 U.S. 547 (1892). The holding was premised upon the court's view of the congressional intent that "indicate[d] attentive and jealous regard for the primary policy of limiting the conduct of matters before grand juries to the local officers [United States Attorneys]." *Id.* at 867.[7] We note that the decision was rendered at a time when

> * * * the rule [was] well settled that where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

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[6] The District Court said:

> The government does not state who, how, or under what guidelines or power the determination that "the subjects under investigation are affiliated with syndicated criminal operations" is made in order that the supervision of particular cases becomes subject to assignment to the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice.
>
> * * * The Attorney General could easily comply with the mandate of Section 515(a) by use of appropriate letters of appointment which would * * * "specifically direct" a particular Special Attorney to conduct all proceedings, including grand jury proceedings, in connection with the particular individuals who have already been identified by someone in the Department of Justice in Washington. * * * (Footnote omitted.)

[7] This limited view of the Attorney General's powers was quickly rejected in *United States v. Cobban,* 127 F. 713 (D. Mont. 1904), and *United States v. Twining,* 132 F. 129 (D. N.J. 1904). The Second Circuit states that the *Rosenthal* court was also concerned with the apparent impropriety of a private group using the grand jury for its own purposes. *In re Grand Jury Subpoena of Alphonse Persico,* No. 75-2030 (2nd Cir. June 19, 1975).

McDowell v. United States, 159 U.S. 596, 602 (1895).[8] It is against this backdrop that we examine the legislative history.

Section 515(a), originally enacted in 1906, overturned the *Rosenthal* decision. Both Houses of Congress introduced bills designed to empower the Attorney General to appoint special attorneys authorized to conduct grand jury proceedings. The Senate bill provided:

> * * * [T]hat all such proceedings shall be begun and conducted by such officials, attorneys, and counsel only under the directions, supervision, and control of the Attorney General.

S. 2969, 59th Cong., 1st Sess. (1906).

The House bill which employed the slightly different limiting language found in the statute was finally accepted by both Houses.

The House Report which accompanied the enacted bill stated:

> The Committee on the Judiciary, having had under consideration the bill (H.R. 17714) to authorize the commencement and conduct of legal proceedings under

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[8] *Accord, May v. United States*, 236 F. 495 (8th Cir. 1916):

> * * * This is not a proceeding to try the title of Mr. Childs to the office of special assistant to the Attorney General for the purposes mentioned in the appointment. It is a motion to quash an indictment for the reason that an unauthorized person took part in the proceedings of the grand jury which resulted in the indictment. Such a motion only attacks the authority of Mr. Childs in a collateral way, and beyond all question he was a de facto officer, acting by color of authority, and his acts are valid until it is judicially declared by a competent tribunal in a proceeding for that purpose that he has no right to the office, the duties of which he is performing. * * *

Id. at 500. *Compare Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962).

> the direction of the Attorney-General, respectfully report the same back with the recommendation that the same do pass.
>
> *The purpose of this bill is to give to the Attorney-General,* or to any officer in his Department *or to any attorney specially employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.*
>
> It has been the practice of the Attorney-General for many years to employ special counsel to assist district attorneys in the prosecution of suits pending in their respective districts whenever the public interest demanded it. It has been the practice of such special counsel to appear, with the district attorney, before grand judges and committing magistrates and to assist in the proceedings pending there. This right passed unchallenged for many years, until the circuit court for the southern district of New York, on March 17, 1903, in the case of the United States *v.* Rosenthal, decided that—
>
> The Attorney-General, the Solicitor-General, nor any officer of the Department of Justice is authorized by sections 359, 367, or any other provision of the Revised Statutes of the United States (U.S. Comp. Stats., 1901, pp. 207, 209), to conduct or to aid in the conduct of, proceedings before a grand jury, nor has a special assistant to the Attorney-General such power.
>
> * * *
>
> This decision makes the proposed legislation necessary if the Government is to have the benefit of the knowledge and learning of its Attorney-General and

> his assistants, or of such special counsel as the Attorney-General may deem necessary to employ to assist in the prosecution of a special case, either civil or criminal. As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be and no matter how necessary it may be to the interests of the Government to have the assistance of one who is specially or particularly qualified by reasons of his peculiar knowledge and skill to properly present to the grand jury the question being considered by it.
>
> The Attorney-General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys or lawyers do not generally possess, and in cases of such usual [sic] importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone.
>
> It seems eminently proper that such power and authority be given by law. It has been the practice to do so in the past and it will be necessary that the practice shall continue in the future.
>
> If such a law is necessary to enable the Government to properly prosecute those who are violating its laws, it is no argument against it that some grand jury may be, perhaps, unduly influenced by the demands or importunities that may be made upon it by such special counsel. The same argument can as well be made against permitting a district attorney from attending a sitting of such jury.

> There can be no doubt of the advisability of permitting the Attorney-General to employ special counsel in special cases, and there can be no question that if he has been employed because of his special fitness for such a special case that the Government should have the full advantage of his learning and skill in every step necessary to be taken before the trial, including that of appearing before grand juries.

H. R. Rep. No. 2901, 59th Cong., 1st Sess. (1906) (Emphasis added).

We are convinced from a careful reading of the statutory language and a review of the legislative history that Special Attorneys Adams' and Cornwell's authorization to conduct grand jury proceedings was proper under §515(a).[9]

Their letters of appointment stated that they were "specially authorized and directed * * * to conduct * * * any kind of legal proceedings * * * including grand jury proceedings * * * which United States Attorneys are authorized to conduct." Section 515(a) on its face does not require more.[10] As stated by the court in *United States v. Brown*, 389 F. Supp. 959 (S.D. N.Y. 1975):

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[9] An attempt to amend the statute so as to eliminate the limitation "when specifically directed by the Attorney General" was made in 1945. Senate Bill, S. 1519, 79th Cong., 1st Sess. (1945). The bill was not reported out of committee and is irrelevant to the interpretation of the legislative history. *See Order of Railway Conductors v. Swan*, 329 U.S. 520, 529 (1947); *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1116 (8th Cir. 1973).

[10] The statute is a broad grant of authority that empowers

> * * * the Attorney General to clothe his subordinates with authority to make any appropriate investigation or prosecution, having to do with any alleged offense under any laws of the United States. * * *

United States v. Amazon Industrial Chemical Corp., *supra* at 257 (holding that the letters of appointment did not have to identify the defendant indicted).

> Clearly, therefore, in express terms [the strike force attorney] was specifically authorized and directed to conduct the kind of grand jury proceedings that led to the indictment here. He was authorized for "any kind" of prosecution which a regular United States Attorney could conduct before any Grand Jury. This is not a case where the prosecutor has been authorized and directed to prosecute only one type of case or to proceed only against a particular defendant or to perform only one particular function and where nonetheless he has overstepped such limited and special authority. * * *

Id. at 960 (Citation omitted.). *Accord, In re Jerry Langella,* No. 74 C 638 (E.D. N.Y. February 27, 1975); *United States v. Irwin Weiner, et al.,* 17 Cr.L. 2024 (N.D. Ill. March 17, 1975) (No. 74 CR 336); *compare United States v. Cohen,* 273 F. 620 (D. Mass. 1921) (special attorney was not specifically directed and authorized to sign informations).[11]

The purported limitation to the Attorney General's powers is not contained in the statute and is contrary to the thrust of the statutory scheme. Congress has placed in the Attorney General the duty to conduct the criminal litigation of the United States. 28 U.S.C. §516; *United*

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[11] In so holding, we reject the view of the Second Circuit that the power of the Attorney General to authorize special attorneys to appear before grand juries is limited to situations where there is a special reason to limit the role of the local district attorney and where that reason has been made explicit by the Attorney General. *In re Grand Jury Subpoena of Alphonse Persico, supra* slip op. at 4167. In light of our holding, it is unnecessary for us to examine whether a sufficient reason can be found in the grants of authority by Congress to the Justice Department to undertake wide ranging and effective attacks on organized crime. *Id.* at 4178. It is equally unnecessary for us to decide whether writings, guidelines, practices and oral directions internal to the Department of Justice but external to the record would be sufficient to meet an additional requirement of explicitness.

States v. Nixon, 41 L.Ed.2d 1039, 1056 (1974). His powers include the direction and supervision of the United States Attorneys and the appointment and removal of their assistants. 28 U.S.C. §§519, 542 and 543.[12] The assertion that §515(a) contains a limitation on the powers of the Attorney General in preservation of the independence of the United States Attorneys is, when placed in context, unpersuasive.[13] *See In re Grand Jury Subpoena of Alphonse Persico,* No. 75-2030, slip op. at 4153-4156 (2nd Cir. June 19, 1975). The statute is not a limitation but a grant of authority that makes the powers of the Attorney General coextensive with his duties.[14] *See United States v. Hall,* 145 F.2d 781, 784 (9th Cir. 1944), *cert. denied,* 324 U.S. 871 (1945); *Sutherland v. International Ins. Co. of*

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[12]
> * * * The Attorney General has powers of "general superintendence and direction" over district attorneys * * * and may directly intervene to "conduct and argue any case in any court of the United States" * * *. Thus he may displace district attorneys in their own suits * * * institute those which they decline to press. * * * His powers must be coextensive with his duties. * * *

Sutherland v. International Ins. Co. of New York, 43 F.2d 969, 970 (2nd Cir.), *cert. denied,* 282 U.S. 890 (1930).

[13] The "independence" of the United States Attorneys is preserved not by a restrictive reading of 28 U.S.C. §515(a) but by 28 U.S.C. §541 which makes them subject to removal only by the President. *See In re Grand Jury Subpoena of Alphonse Persico, supra* at slip op. 4147. There is no evidence in this record to support the view that the special attorneys do not act in conjunction with the United States Attorneys in a coordinated attack on crime. *See id.,* slip op. 4184-4191.

[14] As stated by the Court in *United States v. Hall,* 145 F.2d 781, 784 (9th Cir. 1944), *cert. denied,* 324 U.S. 871 (1945):

> * * * We shall presently see by quoting §310 of Title 5 U.S.C.A. [now 28 U.S.C. §515(a)] that the measure of the district attorney's authority in litigation is made the measure of the Attorney General's authority and that therefore the instant proceeding falls within the latter official's authorization. * * *

Accord, United States v. Sheffield Farms Co., 43 F.Supp. 1, 3 (S.D. N.Y. 1942).

New York, 43 F.2d 969, 970 (2nd Cir.), *cert. denied,* 282 U.S. 890 (1930). Nothing would be gained by requiring the Attorney General to designate the type of case to be prosecuted by the special attorneys when there is no limitation to the scope of his authority. To do so would be to heighten form over substance. *See United States v. Amazon Industrial Chemical Corp.,* 55 F.2d 254, 256 (D. Md. 1931).

Moreover, §515(a) contains no standards by which a court can determine whether a special attorney's appointment is properly limited to particular cases of unusual importance. *See Weiss v. Morgenthau,* 233 F.Supp. 307, 308-309 (S.D. N.Y. 1964), *aff'd per curiam,* 334 F.2d 428 (2nd Cir. 1965). The supposed limitation asserted by the defendant is largely illusionary for the judiciary cannot, absent statutory or constitutional direction, determine the course of executive discretion. *See Goldberg v. Hoffman,* 225 F.2d 463, 465-466 (7th Cir. 1955).

> * * * The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Marbury v. Madison, 1 Cranch 137, 170 (1803).[15]

The purpose of §515(a) is to aid the effective enforcement of the criminal laws, to center the responsibility therefor in the Attorney General, and to insure that the United States is represented by persons with authority. *See United States v. Denton,* 307 F.2d 336, 338 (6th Cir.), *cert. denied,* 371 U.S. 923 (1962); *Shushan v. United States,* 117 F.2d 110, 114 (5th Cir.), *cert. denied,* 313 U.S. 574 (1941); *Sutherland v. International Ins. Co. of New York, supra* at 970; *United States v. Powell,* 81 F.Supp. 288, 291 (E.D. Mo. 1948). All that was done in this case.

The Attorney General stated before the committee that he would employ special attorneys only in cases of unusual importance to the United States requiring expertise not possessed by United States Attorneys, but this limitation was not expressed in the legislative history or the statute. This failure must be understood in light of the Congress's contemporary concern for efficient supervision of the government's legal personnel. The Congress was concerned that there be no duplication of legal effort or continuation of the financial abuses previously incurred in the employment of private attorneys. *See United States v. Crosthwaite,* 168 U.S. 375, 379 (1897); *In re Grand Jury Subpoena of Alphonse Persico, supra* at slip op. 4166; *Sutherland v. International Ins. Co. of New York, supra* at 970. The decision as to when special attorneys were to be employed, however, was left solely to the discretion of the Attorney General. Nothing in the legislative history, and certainly nothing in the statute, evidences a congressional intent to subject the Attorney General's decision to review. His is the duty to conduct the criminal litigation of the United States. 28 U.S.C. §516.

While we are constrained by the language of the statute, we are concerned, as is the District Court, with the policy questions involved in this case. We share many of its apprehensions with respect to the widespread use of special attorneys; an apprehension that has not been lessened by the sometimes inept performance in recent years of special attorneys at the district and appellate levels of this Circuit. But we remain convinced that until Congress imposes limitations on the power of the Attorney General, we must accept his right to authorize, absent a violation of the Constitution, special attorneys to conduct any criminal proceeding in a designated judicial district which United States Attorneys are authorized to conduct. Moreover, we are confident that the Attorney General will exercise his power in a responsible manner.

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[15] None of the cases cited by the defendant or disclosed by our research wherein the appointment of the special attorney was limited to the prosecution of particular cases inquired into the basis of the Attorney General's decision in accordance with the defendant's view of the Congressional intent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1196

United States of America,
Appellant,

v.

Salvatore Ross Agrusa,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 13, 1975
Filed: July 18, 1975

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

In this companion case to *United States of America v. William Robert Wrigley*, No. 75-1235, filed this date, we review the dismissal of an indictment filed against Salvatore Ross Agrusa.[1] In addition to the issue decided in *Wrigley*, we are presented with the question whether the Attorney General can delegate his authority under 28 U.S.C. §515(a) to subordinate officers of the Department of Justice. We reverse the order of the District Court dismissing the indictment.

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[1] The defendant was charged with knowingly buying, receiving, and having in his possession goods and chattels of a value in excess of $100.00 which were moving as, were a part of, and constituted an interstate shipment of freight or express, knowing the same to have been stolen in violation of 18 U.S.C. §659. The indictment was signed by Special Attorney Gary T. Cornwell and the United States Attorney for the Western District of Missouri.

The grand jury proceedings from which the indictment against the defendant issued were conducted by Special Attorneys Philip J. Adams, Jr., Gary T. Cornwell and William E. Zleit. Each is a full-time government attorney of the Department of Justice. Their appointment was by letter from the office of the Attorney General made pursuant to 28 U.S.C. §515(a). The statute reads:

> (a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

The letter of appointment to Adams reads:

> The Department is informed that there have occurred and are occurring in the Western District of Missouri and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.
>
> As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

> Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.
>
> You are to serve without compensation other than the compensation you are now receiving under existing appointment.
>
> Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.
>
> Sincerely,
>
> Henry E. Petersen
> Assistant Attorney General

Zleit's letter of appointment is identical. The letter of appointment to Cornwell is substantially the same and was signed by John C. Keeney, Acting Assistant Attorney General. Each attorney executed the oath of office before entering upon his duties in the Western District of Missouri. The District Court held that the letters of appointment did not comply with 28 U.S.C. §515(a) because the special attorneys were not "specifically directed by the Attorney General."

In *United States of America v. William Robert Wrigley, supra,* we held that letters of appointment which specifically direct the special attorneys to conduct grand jury proceedings in the Western District of Missouri satisfy 28 U.S.C. §515(a). *Accord, In re Grand Jury Subpoena of Alphonse Persico,* No. 75-2030 (2nd Cir. June 19, 1975). The legal and factual contentions raised here are identical to those presented in *Wrigley*. There is no reason to depart from that holding here.

Because the District Court viewed the appointments as invalid under the statute, it did not reach the additional contention of the defendant that the Attorney General cannot delegate his authority under §515(a) to subordinate officers. We now turn to that issue.

Section 510 of Title 28, United States Code, provides:

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

By regulation, the supervision of the Criminal Division of the Department of Justice has been delegated to the Assistant Attorney in charge of that division. 28 C.F.R. §0.55. This delegation includes the power to "* * * designate attorneys to present evidence to grand juries * * *." 28 C.F.R. §0.60. Nothing in 28 U.S.C. §515(a) or its legislative history evidences a congressional intent to limit the delegation authority of the Attorney General under 28 U.S.C. §510. The delegation here to Assistant Attorney General Henry C. Petersen and Acting Assistant Attorney General John C. Keeney was in all respects proper. *See* 28 C.F.R. §0.133; *May v. United States*, 236 F. 495, 500 (8th Cir. 1916); *In re Grand Jury Subpoena of Alphonse Persico, supra* slip op. at 4180-4182; *United States of America v. Philip Crispina*, No. 74 Cr. 932, slip op. at 4-5 (S.D. N.Y. February 13, 1975); *compare United States v. Giordano*, 416 U.S. 505 (1974).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-463

DOMINICK DIGIRLOMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 26, 1975, the United States District Court for the Western District of Missouri adjudged petitioner in civil contempt for refusing to testify before a federal grand jury, despite an order granting him immunity pursuant to 18 U.S.C. 6002.[1] The court of appeals affirmed (Pet. App. 15-19; 520 F. 2d 372).

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[1] The order of contempt was stayed pending final disposition on appeal. The grand jury's term has now expired. The questions presented, however, remain alive, since the government intends to call petitioner before another grand jury. Cf. *Moore* v. *Ogilvie,* 394 U.S. 814; *Sosna* v. *Iowa,* 419 U.S. 393.

The grand jury proceedings at which petitioner refused to testify were conducted by four Criminal Division attorneys assigned to the Kansas City Field Office of the Organized Crime and Racketeering Section of the Department of Justice. Before conducting the grand jury inquiry, each of these attorneys, as indicia of his authority to represent the United States in the Western District of Missouri, filed a letter of authorization and a copy of a duly executed oath of office with the clerk of the district court. Each letter stated that the attorney was "specially retained and appointed as a Special Attorney under the authority of the Department of Justice" and was "specifically authorized and directed" to conduct in the Western District of Missouri "any kind of legal proceedings, civil or criminal, including grand jury proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct." Three of the letters were signed by Henry E. Petersen, Assistant Attorney General, and the other by John C. Keeney, Acting Assistant Attorney General (Pet. App. 16-18).

1. Petitioner contends that he was not required to answer questions before the grand jury because the Organized Crime and Racketeering Section attorneys had not been "specifically directed" to conduct the grand jury inquiry as that phrase is used in 28 U.S.C. 515(a).[2] In order to satisfy the statutory requirement, he argues, the letters of authorization must be limited to specific cases within a specific judicial district. The same contention was rejected by the court below in *United States* v. *Wrigley*, 520 F. 2d 362 (reproduced at Pet. App. 48-62), certiorari denied, November 17, 1975, No. 75-5284.[3] As the court of appeals in *Wrigley* correctly concluded (520 F. 2d at 368-369; Pet. App. 58-59, 60-61):

> The purported limitation to the Attorney General's powers is not contained in the statute and is contrary to the thrust of the statutory scheme. Congress has placed in the Attorney General the duty to conduct the criminal litigation of the United States. 28 U.S.C. § 516 * * *. His powers include the direction and supervision of the United States Attorneys and the appointment and removal of their assistants. 28 U.S.C. §§ 519, 542 and 543. The assertion that § 515 (a) contains a limitation on the powers of the Attorney General in preservation of the inde-

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[2] 28 U.S.C. 515(a) provides:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

[3] Two of the attorneys who conducted the grand jury proceedings here also conducted the proceedings involved in *Wrigley*.

> pendence of the United States Attorneys is, when placed in context, unpersuasive. * * * The statute is not a limitation but a grant of authority that makes the powers of the Attorney General coextensive with his duties. * * *
>
> * * * * *
>
> The purpose of § 515(a) is to aid the effective enforcement of the criminal laws, to center the responsibility therefor in the Attorney General, and to insure that the United States is represented by persons with authority. * * * All that was done in this case. [Footnote omitted.]

The only other court of appeals that has ruled on the question also concluded that letters of authorization nearly identical to those involved here satisfied the statute. See *In re Di Bella*, 518 F. 2d 955, 958 (C.A. 2); *In re Subpoena of Persico*, 522 F. 2d 41 (C.A. 2).[4]

2. Petitioner also contends that the Attorney General could not properly delegate to the Assistant Attorney General his statutory authority to assign Department of Justice attorneys to conduct grand

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[4] Although the opinion in *Persico* suggests that the statute contemplates that such authority should be given only when there is some reason to limit the role of the United States Attorney—a suggestion with which the court of appeals in *Wrigley* took issue (520 F. 2d at 368, n. 11; Pet. App. 58, n. 11)—there is no conflict requiring resolution by this Court, for the Second Circuit concluded that there was adequate reason for authorizing Criminal Division attorneys to conduct grand jury investigations of organized crime. Even under the Second Circuit's standard, therefore, the appointments in this case were valid.

jury inquiries. That contention was also rejected by the court below in *United States* v. *Agrusa*, 520 F. 2d 370 (reproduced at Pet. App. 63-66). As the court correctly stated in *Agrusa* (520 F. 2d at 372; Pet. App. 66):

> By regulation, the supervision of the Criminal Division of the Department of Justice has been delegated to the Assistant Attorney in charge of that division. 28 C.F.R. § 0.55. This delegation includes the power to "* * * designate attorneys to present evidence to grand juries * * *." 28 C.F.R. § 0.60. Nothing in 28 U.S.C. § 515(a) or its legislative history evidences a congressional intent to limit the delegation authority of the Attorney General under 28 U.S.C. § 510. The delegation here to Assistant Attorney General Henry C. Petersen and Acting Assistant Attorney General John C. Keeney was in all respects proper.

See also *In re Subpoena of Persico*, *supra*, 522 F. 2d at 66-67.

United States v. *Giordano*, 416 U.S. 505, is not to the contrary. The Court there held that the Attorney General could not properly delegate to his Executive Assistant his authority under 18 U.S.C. 2516(1) to authorize an application for a court order permitting the interception of wire communications. Unlike the situation here, however, "the matter of delegation is expressly addressed by § 2516 and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General'" (416 U.S. at 514). Nothing in the language, purpose, or legislative history of 28 U.S.C. 515 imposes any limitation upon the Attorney General's authority under 28 U.S.C. 510 to "authoriz[e] the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Robert H. Bork,
Solicitor General.

December 1975.

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